

In the Matter of)
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Connect America Fund) WC Docket No. 10-90
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To: The Commission

Hughes Network Systems LLC (“Hughes”), pursuant to Section 1.429(f) of the Commission’s Rules,¹ opposes the Petition for Reconsideration filed on September 19, 2018, by Viasat, Inc.² regarding the Commission’s order on July 6, 2018 in the above-captioned proceeding that establishes performance metrics for recipients of high-cost universal service support.³ Specifically, Hughes opposes Viasat’s request to modify the framework for testing for compliance with the Mean Opinion Score (“MOS”) requirement for high-latency bidders in the Connect America Fund Phase II (“CAF-II”) auction that concluded August 21, 2018.⁴ These standards were established prior to the auction, the Commission declined to make any changes to the standards in response to parties’ requests prior to the auction, and prospective bidders made bidding decisions based upon them—including decisions regarding whether or not to bid.

⁴ See Federal Communications Commission, *Connect America Fund Phase II Auction (Auction 903)*, <https://www.fcc.gov/auction/903> (last visited Oct. 9, 2018).

Changing the standards after the conclusion of the auction would upset bidders' settled expectations of the requirements for the auction and nullify the auction's results. Accordingly, the Commission must deny Viasat's Petition.

DISCUSSION

On July 6, 2018, approximately two weeks before the CAF-II auction was set to commence, the Wireline Competition Bureau, along with the Wireless Telecommunications Bureau and the Office of Engineering and Technology, issued the *Metrics Order* which, among other things, set specific standards for high-latency bidders such as satellite providers to demonstrate compliance with the required showing of a MOS of four or higher.⁵ Specifically, the order requires support recipients to comply with a modified version of the "conversational-opinion" test specified in the ITU-T Recommendation P.800 conversational-opinion test using "operational network infrastructure" such as actual satellite links rather than "laboratory-based simulations intended to reproduce service conditions."⁶ The order also requires the use of a third party to conduct the MOS testing.⁷

Before the auction began, a number of parties (including both Viasat and Hughes) raised concerns about the *Metrics Order* with Commission staff,⁸ but the Commission declined to make

⁵ *Metrics Order* at ¶ 44.

⁶ *Id.* at ¶ 45.

⁷ *Id.*

⁸ See e.g., Notices of Ex Parte of Hughes, WC Docket No. 10-90, (filed July 16, 2018), [https://ecfsapi.fcc.gov/file/10716214546353/Hughes%20CAF%20Metrics%20ex%20parte%20\(7-12-18\).pdf](https://ecfsapi.fcc.gov/file/10716214546353/Hughes%20CAF%20Metrics%20ex%20parte%20(7-12-18).pdf), and (filed July 19, 2018), [https://ecfsapi.fcc.gov/file/10719807702516/Hughes%20OCH%20CAF%20Metrics%20ex%20parte%20\(7-18-18\).pdf](https://ecfsapi.fcc.gov/file/10719807702516/Hughes%20OCH%20CAF%20Metrics%20ex%20parte%20(7-18-18).pdf); Notice of Ex Parte of Viasat, WC Docket No. 10-90, (filed July 23, 2018), <https://ecfsapi.fcc.gov/file/10723264115381/Viasat%20MOS%20Ex%20Parte%207-23-2018.pdf>. Other parties also urged the Commission to make changes during the early days of the auction. See, e.g., Notices of Ex Parte of NTCA-The Rural Broadband Association, WC Docket No. 10-90, (both filed July 30, 2018), <https://ecfsapi.fcc.gov/file/1073069054437/07.27.18%20Ex%20Parte%20letter%20re%20Yelen%20telep>

any changes. As a result, prospective bidders had no choice but to make bidding decisions, including decisions on whether or not to bid, based on the rules in effect at the time of the auction.

If the Commission now, after the auction has ended, modifies the testing standards that high-latency bidders must meet, it would upset bidders' settled expectations of the requirements for auction participation. This in turn would pull the foundation out from under the decisions that bidders made about whether and how to bid in the auction, throwing the results of the auction in to question and undermining the integrity of the auction process.

As Hughes noted in its own petition for clarification of the *Metrics Order* on different grounds, the Commission has stated previously that “[c]ompetitive bidding is likely to be more efficient if potential bidders know what their performance standards will be before bids are made.”⁹ The Commission has also stated that, while the competitive neutrality does not require all competitors to be treated alike, the Commission is prohibited from treating competitors differently in “unfair” ways.¹⁰ Relaxing the performance requirements for CAF-II winners after the auction closes would constitute unfair treatment to interested bidders who rationally made bidding decisions based on the rules in effect at the time of the auction.

<https://ecfsapi.fcc.gov/file/1073067917043/07.27.18%20Ex%20Parte%20letter%20re%20Schwarz%20telephone%20conversation.pdf>, and <https://ecfsapi.fcc.gov/file/1073189559855/USTelecom-CAF-Measurement-Ex-Parte-2018-07-31-FINAL.pdf>; Notice of Ex Parte of USTelecom Association, WC Docket No. 10-90, (filed July 31, 2018), <https://ecfsapi.fcc.gov/file/1073189559855/USTelecom-CAF-Measurement-Ex-Parte-2018-07-31-FINAL.pdf>.

⁹ Hughes Network Systems, LLC, Petition for Clarification or, in the Alternative, Reconsideration, WC Docket No. 10-90 at 4 (filed Sept. 19, 2018), *quoting Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 5949, 5958 (2016). Hughes seeks clarification that the *Metrics Order* does not impose new requirements on winning bidders in the New York CAF auction, which concluded long before the *Metrics Order* was adopted.

¹⁰ *Id.* at 5986 n.211.

Viasat should also be familiar with this argument. In a separate FCC proceeding involving changing performance requirements after the cutoff date, Viasat argued in a Petition to Deny that *post-hoc* rule changes “threaten to create inequities among applicants and reward operators that were unwilling to comply with the Commission’s rules in the first instance.”¹¹ Viasat further argued that “[f]undamental fairness mandates equitable treatment of all applicants in [the FCC proceeding].”¹² Viasat’s argument applies with equal force to the present proceeding.

CONCLUSION

The performance standards for participants in Commission universal service auctions must be clear at the time bidders are required to make bidding decisions. To change those standards after an auction has concluded would nullify the results of the auction. Viasat’s petition must be denied.

Respectfully submitted,

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¹¹ Viasat, *Petition to Deny or Impose Conditions of Viasat, Inc.*, IBFS File No. SAT-LOA-20161115-00117 (Call Sign S2982) *et al.*, at 23 (filed June 26, 2017), http://licensing.fcc.gov/myibfs/download.do?attachment_key=1242100.

¹² *Id.* at 24.